No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

BRENDA PATTERSON,

Petitioner,

v.

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON REARGUMENT FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CONRAD K. HARPER
STUART J. LAND
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
JUDITH A. WINSTON
RICHARD T. SEYMOUR
STEPHEN L. SPITZ
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
(Suite 400)
Washington, D.C. 20005
(202) 371-1212

THOMAS D. BARR
ROBERT F. MULLEN
Counsel of Record
PAUL M. O'CONNOR III
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
(212) 428-1000

*Attorneys for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae**

*Additional Counsel Listed on Signature Page

June 24, 1988

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to Blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local offices have represented the interests of Blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

Amicus has a direct interest in the law governing the construction and application of the civil rights statutes. *Amicus* and its clients litigate under these statutes regularly and thus have a substantial incentive to prevent diminution of the statutes' powers as sources of redress for civil rights violations.

The Lawyers' Committee has a particularly strong interest in preserving the section 1981 anti-discrimination rights recognized by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976). The Washington Lawyers' Committee represented McCrary in that case and urged the result reached by the Court. Since that time, the Lawyers' Committee has been involved in many section 1981 cases and views that statute, as interpreted in *Runyon*, as essential in the battle against discrimination.

Amicus submits this brief to emphasize the view that, even if a majority of this Court were now to conclude that *Runyon* was incorrectly decided, it should not be overruled under established principles of *stare decisis*. That is so especially considering "congressional agreement" with the result, *Runyon*, 427 U.S. at 175, and its complete consistency with the anti-discrimination "*mores* of [to]day", *id.* at 191 (Stevens, J., concurring) (citing Justice Cardozo). Consideration must also be given to the serious harm overruling *Runyon* would cause to many pending cases in the lower courts and to the future enforcement of civil rights under law.

SUMMARY OF ARGUMENT

Twelve years ago this Court held in *Runyon v. McCrary* that 42 U.S.C. § 1981 prohibits private, commercially operated, non-sectarian schools from discriminating on the basis of race, and therefore that section 1981 "reaches purely private acts of racial discrimination". 427 U.S. at 170.

This Court now asks "[w]hether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary* should be reconsidered?" *Patterson v. McLean Credit Union*, 108 S. Ct. 1419, 1420 (1988) (citation omitted). The answer is no.

For the reasons set forth by the majority and concurring opinions in *Runyon*, and those set forth in the 1976 Lawyers' Committee Brief for Respondent McCrary, the Lawyers' Committee believes that the legislative history of the 1866 Civil Rights Act and the doctrine of *stare decisis* overwhelmingly support the result reached in *Runyon*. There is, therefore, in the Lawyers' Committee's view, no cause or reason to reconsider the interpretation of section 1981 adopted by the Court in *Runyon*. Moreover, *stare decisis*, itself a fundamental basis for the majority and concurring opinions in *Runyon*, counsels even more strongly now than it did in 1976 against overruling this important statutory precedent.

Unless a prior decision is "'flatly' unjust"[1] or "disserves important interests",[2] *stare decisis* constrains this Court from reconsidering statutory precedent. For *stare decisis* not to apply, there must be "special justification",[3] for "[o]nly the

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1 Pound, *What of Stare Decisis?*, 10 Fordham L. Rev. 1, 6 (1941).

2 *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 216 (1978) (Brennan, J., dissenting).

3 *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

most compelling circumstances can justify this Court's abandonment of . . . firmly established statutory precedent[]".[4]

Dean Pound expressed his view on this point a half century ago:

> "[N]othing less than an overriding conviction that a precept fixed by a prior decision was contrary to the principles of the law so that it had an ill effect upon the process of determining new questions by analogical reasoning *and* was, as Blackstone puts it, '*flatly*' unjust in its results, could justify judicial rejection of it."[5]

Whether or not *Runyon* was correctly decided twelve years ago, it is not so "contrary to the principles of the law so that it [has] had an ill effect upon the process of determining new questions by analogical reasoning". Nor could anyone seriously argue today that the decision in *Runyon* is "'flatly' unjust in its results". *Runyon*'s recognition of an unquestionably constitutional statutory right to be free from private racial discrimination cannot be deemed a "'flatly' unjust" result.

Other fundamental *stare decisis* considerations also weigh heavily against overruling *Runyon*. First, this Court has repeatedly and recently reaffirmed the *Runyon* holding, thereby directly implicating the purposes of *stare decisis*—consistency, predictability and stability—values central to the very concept of the rule of law. Second, *Runyon* is statutory precedent. This Court has long recognized that it is most bound by *stare decisis* when reconsidering statutory precedent, especially in a case such as *Runyon*, where Congress explicitly endorsed that precedent only four months after it was handed down by passage of the Civil Rights Attorney's Fees Award Act of 1976. *See infra* at 14-16.

This is not a case where the Court is called upon to address asserted error of constitutional dimension as in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985),

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4 *Monell v. Department of Social Servs. of New York*, 436 U.S. 658, 715 (1978) (Rehnquist, J., dissenting).

5 Pound, *supra* note 1, at 6 (emphasis added).

where effective congressional action may be difficult or impossible. Rather, this Court's interpretation of the federal civil rights laws, and section 1981 in particular, is "an area that has seen careful, intense, and sustained congressional attention". *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986).

Lastly, nothing in the circumstances of the petitioner's claim in this case could in any event justify overruling *Runyon*. Petitioner's racial harassment claim states a cause of action under section 1981.

ARGUMENT

I. *RUNYON v. McCRARY* SHOULD NOT BE OVERRULED

Twelve years ago, our local affiliate, the Washington Lawyers' Committee for Civil Rights Under Law, represented Michael McCrary before this Court. In our brief to this Court in February 1976, we argued that "[t]he court of appeals was plainly correct in holding that plaintiffs' rights guaranteed by 42 U.S.C. Sec. 1981 were violated as a result of the racially discriminatory admission policies of the defendant schools".[6]

Twelve years ago seven members of this Court agreed that section 1981 barred private acts of discrimination, expressing the view that the result in *Runyon* itself followed from "well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes". *Runyon*, 427 U.S. at 175; *see also id.* at 186-89 (Powell, J., concurring); *id.* at 189-92 (Stevens, J., concurring).

In the interim, has anything happened which could or should change the Court's result on solely the *stare decisis* issue, fully litigated in *Runyon* itself? Since 1976, has there been a change in the anti-discrimination "*mores* of [the] day" that Justice Stevens found to support the result in *Runyon*?[7] Has

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6 *Brief for the Respondents*, *Runyon v. McCrary*, Nos. 75-62, 75-66 and 75-278, p.13.

7 *Runyon*, 427 U.S. at 191 (Stevens, J., concurring) (citing Justice Cardozo).

there been any indication from Congress which would change what Justice Stewart concluded, writing for the Court in *Runyon*: "There could hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination"? *Id.* at 174-75.

Each of these questions must be answered flatly and unequivocally no. This Court correctly decided *Runyon* in 1976 and it remains correct today. *Runyon* has become an important part of the fabric of civil rights law enforcement in this country. For *Runyon* to be overruled at this point, it would necessarily be true that "stare decisis seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact".[8]

That would be a deplorable result. As Justice Cardozo recognized over a half-century ago:

> "One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfullness. . . . [T]here shall be adherence to precedent."[9]

Similarly, Justice Harlan, writing for the Court in *Moragne v. State Marine Lines*, 398 U.S. 375 (1970), emphasized the importance of *stare decisis*[10] to an ordered society:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these [is] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise . . . ."

Id. at 403.

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8 Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 743 (1988).

9 B. Cardozo, *The Nature of the Judicial Process* 112 (1921).

10 *Stare decisis* is derived from the Latin phrase *stare decisis et non quieta movere*, which means "let the decision stand and do not disturb things which have been settled". A. Goldberg, *Equal Justice: The Warren Era of the Supreme Court* 74 (1971).

Overruling precedent, especially recent precedent, Professor Archibald Cox wrote, "undermine[s] the belief that judges are not unrestrainedly asserting their individual or collective wills, but following a law which binds them as well as the litigants".[11] More recently, Professor Cox concluded:

> "The future of judicial review probably depends in good measure on whether the view that law is only policy made by courts carries the day in the legal profession, or whether room is left for the older belief that judges are truly bound by law both as a confining force and as an ideal search for reasoned justice . . . ."[12]

Justice Stevens, declining to argue for overruling a prior decision which he believed may have been erroneously decided, summarized:

> "Of even greater importance, however, is my concern about the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel."

Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (concurring opinion) (footnotes omitted).

Recently, Judge Posner observed that failure to follow precedent undermined the legitimacy of the federal judiciary by weakening popular acceptance of the force of judicial decisions.[13] Chief Justice Hughes expressed the same view sixty years ago, stating: "Stability in judicial opinions is of no little importance in maintaining respect for the Court's work".[14]

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11 A. Cox, *The Role of the Supreme Court in American Government* 50 (1976).

12 A. Cox, *The Court and the Constitution* 377 (1987).

13 Levy, *Posner Portrays Judges as Deciders*, Harv. L. Rec., Nov. 21, 1986, at 5, 13.

14 C. Hughes, *The Supreme Court of the United States* 53 (1928).

For these reasons, even if a majority of this Court should now conclude that *Runyon* was incorrectly decided, it should not be overruled. As Professor Monaghan wrote:

> "Even an 'overriding conviction' of prior error is not enough; the precedent must have some palpable adverse consequences beyond its existence."[15]

This basic principle of *stare decisis* should control the result here. First, *Runyon* is not so "contrary to the principles of the law" that it has had "an ill effect upon the process of determining new questions by analogical reasoning".[16] Since *Runyon*, this Court has held repeatedly that section 1981 reaches private conduct, *see Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987); *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987); *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); and in no decision since *Runyon* has any member of this Court suggested that the "precept fixed" by that decision is somehow "contrary to principles of law" or that it has "had an ill effect" upon determining new questions.

Nor, moreover, could this Court reasonably conclude that *Runyon* was "'flatly' unjust in its results",[17] for *Runyon* is neither inconsistent with related laws nor has it led to unforeseeable, unjust results.[18] The *Runyon* decision upheld "the *mores* of [its] day". *Id.* at 191 (Stevens, J., concurring) (quoting Justice Cardozo). *Runyon* remains completely consistent with the *mores* of the present day which find racial discrimination abhorrent. When presented with the issue, every Justice on this Court has joined opinions affirming *Runyon*'s holding that section 1981 affords a remedy against private acts of racially motivated discrimination.[19] For example, writing for a unanimous Court in *Saint Francis College*, Justice White stated:

> "[T]he Court has construed [section 1981] to forbid all 'racial' discrimination in the making of private as well as public contracts. The petitioner college, although a private institution, was therefore subject to this statutory command."

Id. at 2026 (citation omitted).

A "'flatly' unjust" result is not merely one which a majority of the Court now may believe is "clearly wrong" or that it "very much dislikes".[20] The majority and dissent in *Runyon* disagreed strongly over the legislative history of section 1981. However, whether the majority was correct in its

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15 Monaghan, *supra* note 6, at 758 (quoting Pound, *supra* note 1, at 6). Similarly, Professor Maltz noted:

> "[R]eaching . . . a conclusion that a prior case is erroneous is only the first step in deciding to overrule that case. In making the decision, the justice must be sensitive to the tangible and intangible problems involved when a precedent is abandoned. Only if these problems are outweighed by the benefits to be derived from the new doctrine to be adopted should the Court abandon stare decisis in a particular case."

Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 493 (footnote omitted).

16 Pound, *supra* note 1, at 6.

17 *Id.*

18 For example, section 1981 overlaps largely with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), although the two statutes differ in both scope and application. Title VII prohibits employment discrimination based on race, color, religion, sex or national origin, 42 U.S.C. § 2000e-2, while section 1981 prohibits only discrimination based on race or color, *Saint Francis College*, 107 S. Ct. at 2028. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460-61 (1975) (comparing section 1981 and title VII); Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 Duke L.J. 1223, 1230-31 (same). *Compare Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII liability may be predicated upon disproportionate impact) *with General Bldg. Contractors Ass'n*, 458 U.S. 375 (section 1981 liability requires proof of discriminatory intent).

19 *See Goodman*, 107 S. Ct. at 2622-23, 2625 (employer's intentional racially discriminatory treatment of employees violated section 1981; union's refusal to file grievances for victims of racial harassment violated section 1981); *Saint Francis College*, 107 S. Ct. at 2026-28 (section 1981 protects against intentional discrimination motivated by ethnic characteristics or ancestry; Arab has remedy against employer); *General Bldg. Contractors Ass'n*, 458 U.S. at 391 (proof of intentional discrimination required to impose section 1981 liability); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 653 (1979) (White, J., concurring) ("[sections 1981 and 1982] remained a declaration of rights that all citizens in the country were to have against each other, as well as against their Government"); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286-87 (1976) (section 1951 applies to racial discrimination in private employment against white persons).

20 Monaghan, *supra* note 6, at 760, 762.

historical interpretation twelve years ago does not determine this Court's decision today, especially given this Court's clear line of subsequent decisions affirming *Runyon*'s interpretation of section 1981.[21] In sum, the "exceptional action of overruling"[22] cannot be predicated on incorrectness.[23]

Beyond the general considerations weighing against overruling precedent, special considerations have guided this Court when it has reconsidered statutory interpretation. These special considerations are premised upon Congress' ability to correct interpretations it considers in error. Chief Justice Rehnquist, writing for the Court in *Oklahoma City v. Tuttle*, 471 U.S. 808, 818-19 n.5 (1985), observed that where this Court's "decision is subject to correction by Congress, we do a great disservice when we subvert these concerns [of *stare decisis*] and maintain the law in a state of flux".[24]

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21 Even in constitutional cases, where this Court has suggested the constraints of *stare decisis* are more easily overcome, ambiguous historical evidence has not been sufficient to provide the "special justification" required for a departure from *stare decisis*. *See Welch v. Texas Dep't of Highways and Pub. Transp.*, 107 S. Ct. 2941, 2956-57 (1987) (discussing the force of Justice Brennan's historical arguments for a re-interpretation of the Eleventh Amendment cases); *Papasan v. Allain*, 478 U.S. 265 (1986); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 n.3 (1985). *A fortiori*, where the constraints of *stare decisis* are more severe, such as with statutory precedent, historical evidence of contrary intent alone cannot suffice as "special justification".

22 *Ramsey*, 467 U.S. at 212.

23 Chief Justice Marshall acknowledged this principle when he noted that only the combination of several factors warranted overruling: "Although [the prior] case was decided by a divided court, and although we think, that upon the true construction of the . . . act . . . [the prior case was wrongly decided], we should be much inclined to adhere to the decision . . . had not a contrary practice since prevailed." *Gordon v. Ogden*, 28 U.S. (3 Pet.) 32, 34 (1830).

24 *See also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (White, J., writing for the Court) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); *United States v. South Buffalo R.R. Co.*, 333 U.S. 771, 774-75 (1948) (Jackson, J., writing for the Court) ("[W]hen the questions are of statutory construction, . . . Congress can rectify our mistake . . . and in these circumstances reversal is not readily to be made") (citation omitted); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 60 (1977) (White, J., concurring in judgment) ("[C]onsiderations of *stare decisis* are to be given particularly strong weight in the area of statutory construction"); *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 641 (1983) (Stevens, J., dissenting) ("If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress"); *Monell*, 436 U.S. at 714-15 (Rehnquist, J., dissenting) ("In all cases, private parties shape their conduct according to this Court's settled construction of the law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit"); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting) ("[A]ny subsequent 'reinterpretation' . . . is gratuitous and neither more nor less than an amendment: it is no different in effect from a judicial alteration of language that Congress itself placed in the statute").

This Court recently reviewed a Second Circuit decision in which Judge Friendly suggested that a 60 year-old Supreme Court precedent, upon which he based the Second Circuit's decision, might be overruled in light of subsequent developments. Justice Stevens, writing for the Court, declined to do so:

> "We conclude, however, that the developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute. As Justice Brandeis himself observed, a decade after his *Keogh* decision, in commenting on the presumption of stability in statutory interpretation: '*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.' *We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention.* If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court."

Square D, 476 U.S. at 424 (footnotes omitted) (emphasis added).

Over the past two decades, this Court's interpretation of the federal civil rights laws generally, and this Court's interpretation of section 1981 specifically, is "an area that has seen

careful, intense, and sustained congressional attention". *Id.* Congress' recent passage of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), was in direct response to this Court's interpretation of Title IX of the Education Amendments of 1972 in *Grove City College v. Bell*, 465 U.S. 555 (1984).[25] Similarly, in 1982 Congress amended section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to restore the legal standard that had governed voting discrimination cases prior to this Court's holding in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion).[26] And in 1978 Congress enacted the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978), responding to this Court's interpretation of Title VII of the Civil Rights Act of 1964 in *General Electric Company v. Gilbert*, 429 U.S. 125 (1976).[27]

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25 In *Grove City*, this Court held that the non-discrimination provisions of Title IX could be applied only to the particular program or activity actually receiving federal financial assistance, not to the recipient institution as a whole. Given the similarity of the language and legislative history of other statutes barring discrimination in federal financial assistance, *Id.* at 566, Congress acted to correct the Court's interpretation as it might apply to each of these statutes. The Civil Rights Restoration Act stated that "recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964" and that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered". Pub. L. No. 100-259, § 2, 102 Stat. 28 (1988).

26 In *Bolden*, this Court held that a challenge to an electoral system under section 2 of the Voting Rights Act must demonstrate purposeful racial discrimination. 446 U.S. at 62-65. Congress' amendment to the statute corrected this interpretation. Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982), *codified as amended at* 42 U.S.C. § 1973 (1982). The Senate Judiciary Committee explicitly rejected this Court's reading, stating it found no persuasive evidence to support the Court's argument that the 15th Amendment and the 1965 Voting Rights Act made proof of discriminatory purpose an essential requirement of section 2 when it was first enacted. *Voting Rights Act Amendments of 1982*, S. Rep. No. 417, 97th Cong., 2d Sess. 15-16, *reprinted in* 1982 U.S. Code Cong. & Admin. News 192-93.

27 Finding that an employer's disability plan which excluded sickness and accident benefits connected with disabilities arising from pregnancy did not violate Title VII, this Court held "gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive". *General Electric*, 429 U.S. at 138-39. In 1978, Congress rejected this interpretation, and amended Title VII "to clarify Congress' intent to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment". *Pregnancy Discrimination Act of 1978*, H.R. Rep. No. 948, 95th Cong., 1st Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4749, 4750. Concerned that the "Supreme Court's narrow interpretations of Title VII [would] tend to erode our national policy of nondiscrimination in employment", *id.* at 4751, Congress clarified its objective through statutory amendment.

In each case, when Congress considered this Court's interpretation of a federal civil right statute to be incorrect, it acted to change that interpretation. In sharp contrast, Congress has repeatedly acknowledged the correctness of the *Runyon* result.

Prior to *Runyon*, Congress specifically affirmed the vitality of section 1981 as applied to private acts of discrimination. As noted in *Runyon*, this Court had acknowledged as early as 1968 that section 1981 applied to private acts of discrimination. 427 U.S. at 168 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968)). It was in light of this interpretation that Congress, in 1972, specifically rejected an amendment offered by Senator Hruska to the Equal Employment Opportunities Act that would have consolidated all anti-discrimination remedies under Title VII. 118 Cong. Rec. 3368-70 (1972). Opposing this amendment, Senator Williams stated that the proposed improvements in the enforcement machinery and coverage of Title VII were "premised on the continued existence and vitality of other remedies for employment discrimination". *Id.* at 3371. Senator Williams also observed that:

> "[The] right of individuals to bring suits in Federal courts to redress individual acts of discrimination . . . was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. sections 1981, 1983. It was recently stated by the Supreme Court in the case of Jones v. Mayer, that these acts provide fundamental constitutional guarantees. In any case, the courts have specifically held that title VII and the Civil Rights Act of 1866 and 1871 are not mutually exclusive and must be read together to provide alternative means to redress individual grievances."

Id.

Additionally, in the House Education and Labor Committee's report on the Equal Employment Opportunities Act, the Committee explicitly affirmed the results of recent circuit court decisions which had held that "remedies available to an individual under Title VII are coextensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive". *Equal Employment Opportunities Enforcement Act of 1971*, H.R. Rep. No. 238, 92d Cong., 2d Sess. 19, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2154. Congress' rejection of the proposal to consolidate anti-discrimination remedies under Title VII was unanimously relied upon by this Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *id.* at 468 (Marshall, Douglas, and Brennan, JJ., concurring on this point); and also in *Runyon*:

> "There could hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination."

427 U.S. at 174-75.[28]

Congress has taken no action to correct this Court's interpretation of section 1981 in *Runyon*. Instead, Congress has relied on this interpretation. Congressional reliance on the *Runyon* result is clearly evidenced by 1976 legislation authorizing the award of attorney's fees in section 1981 cases, legislation enacted just four months after *Runyon* was decided.[29] Acknowledging that civil rights laws "depend heavily upon

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28 Section 1981 complements other statutory causes of action, particularly Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* While both Title VII and section 1981 address employment discrimination, *see supra* note 18, section 1981 significantly differs in that it applies, as in *Runyon*, to contracts which do not concern employment and it enables victims of discrimination to recover compensatory and, in egregious circumstances, punitive damages. *See Johnson*, 421 U.S. at 460-61. In contrast, Title VII damage recovery is limited to awards of back pay. As this Court concluded in *Johnson*: "The remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 461.

29 *Runyon* was decided on June 25, 1976; the Civil Rights Attorney's Fees Award Act of 1976 was enacted on October 19, 1976.

private enforcement" and fee awards are "an essential remedy" to allow private citizens "a meaningful opportunity to vindicate the important Congressional policies which these laws contain", *Civil Rights Attorney's Fees Award Act of 1976*, S. Rep. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5900, 5910, Congress specifically amended the Civil Rights Act of 1866 to include a provision for fee awards, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 42 U.S.C. § 1988.[30] In passing the Act, Congress explicitly relied upon the fact that "section 1981 is frequently used to challenge employment discrimination based on race or color". *Civil Rights Attorney's Fees Award Act of 1976*, H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 (1976) (citing *Johnson* and *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)). Congress also relied upon the use of section 1981 as a remedy against racially exclusionary policies in recreational facilities, as this Court had earlier recognized in *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973). H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4. The Senate Report, noting the interrelationship between promoting civil rights and granting fee awards, flatly stated that "[i]n the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the [law's] goals". S. Rep.

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30 The Act was passed in response to this Court's holding in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), that federal courts had no discretion to award attorney's fees to prevailing plaintiffs, absent statutory authorization. Congress acted quickly to eliminate the inconsistent situation that allowed an award of attorney's fees in an employment discrimination suit brought under Title VII, but denied such an award in a similar suit brought under section 1981. As the Senate Report pointed out:

> "*Alyeska* . . . created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights case. For instance, fees are now authorized in an employment discrimination suit under Title VII . . . but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action."

Civil Rights Attorney's Fees Award Act of 1976, S. Rep. No. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910.

No. 1011, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong & Admin. News at 5910.

The foregoing provides the context for assessing the statement in the Court's *per curiam* opinion in this case that "we have explicitly overruled statutory precedents in a host of cases". *Patterson*, 108 S. Ct. at 1420. Certainly there are cases where *stare decisis* has not been given effect, even with respect to statutory precedent. However, a review of each of the cases cited in the Court's *per curiam* opinion on this point strongly suggests that they rest on very different footing from this case: in each case cited, there was "special justification" for departure from precedent; there was not the congressional attention to, agreement with, and support of, the precedent as is so demonstrably present here; those cases did not involve sharp departure from the *mores* of their day; they did not produce "flatly unjust" results; none overruled recent precedent which itself was explicitly based upon *stare decisis*; none involved overruling precedent recognizing or affirming a substantive statutory right; and none carried the tremendous threat of harm to many pending cases and to the future enforcement of civil rights under law.

(i) By overruling *Monroe v. Pape*, 365 U.S. 167 (1961), in *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978), this Court returned consistency to the law regarding the liability of local governments for civil rights violations. The immunity from section 1983 liability that *Monroe* had granted municipal corporations conflicted with decisions imposing section 1983 liability on school boards.[31] Unlike *Monroe*, *Runyon* is consistent both with prior and subsequent decisions. In *Jones*, 392 U.S. at 441-43 n.78, this Court had interpreted section 1981 as barring racial discrimination in the making and enforcement of contracts. Subsequently, the Court banned racial exclusivity in the membership and guest policy of a private neighborhood swimming club under sections 1981 and 1982, *Tillman*, 410 U.S. at 439-40, and the Court unanimously concluded in *Johnson* that "[section] 1981 affords a federal remedy against discrimination in private employment on the basis of race",

31 *See Monell*, 436 U.S. at 663 n.5 (citing school board cases).

421 U.S. at 459-60; *id.* at 468 (Marshall, Douglas, and Brennan, JJ., concurring on this point). Furthermore, as Justice Stevens noted, concurring in *Runyon*, Congress had formulated a policy of "eliminating racial segregation in all sectors of society", and "[t]his Court has given a sympathetic and liberal construction" to the legislation directed at racial discrimination. 427 U.S. at 191. It would have been inconsistent, Justice Stevens concluded, for the Court to have decided *Runyon* differently in light of congressional policy and Supreme Court precedent. *Id.* at 191-92.

(ii) In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), this Court overruled *International Union, Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), recognizing that its previous interpretation of the Wagner Act and Taft-Hartley Act had been undermined by subsequent decisions and now operated to frustrate national labor policy. Similarly, this Court overruled *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S 235, 254-55 (1970), on the grounds that *Sinclair*'s holding frustrated the peaceful settlement of labor disputes and constituted a significant departure from the consistent emphasis on arbitration. *Runyon*, however, does not frustrate but rather furthers congressional policy against racial discrimination, and its holding has not been weakened but rather bolstered by subsequent decisions.

(iii) In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court overruled its earlier interpretation of section 1 of the Sherman Act in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The Court in *Continental T.V.* overruled precedent which was "itself . . . an abrupt and largely unexplained departure" from the law in the antitrust area, which the lower courts had "sought to limit". *Id.* at 47-48. *Runyon*, in contrast, is consistent with other anti-discrimination laws.

(iv) This Court overruled *Ahrens v. Clark*, 335 U.S. 188 (1948), in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), because the strict territorial limit *Ahrens* imposed on the filing of habeas corpus petitions had been un-

dermined both by congressional amendments to the habeas corpus statute and by subsequent decisions of this Court.

(v) In *Peyton v. Rowe*, 391 U.S. 54 (1968), the Court overruled the prematurity rule of *McNally v. Hill*, 293 U.S. 131 (1934), and held that a prisoner serving consecutive sentences may challenge sentences he had not yet begun to serve. The *Peyton* Court concluded that the holding in *McNally* "undermine[d] the character of the writ of habeas corpus", and that the reasoning in *McNally* was "inconsistent" with subsequent decisions of the Court. 391 U.S. at 63-64. Similarly, this Court overruled *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941), in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972), because congressional modifications to the arbitration procedures of the Railway Labor Act and subsequent decisions of this Court making arbitration a compulsory remedy contradicted *Moore*'s holding.

In sum, by overruling precedent in these cases this Court enhanced the consistency and fairness of the law. That conclusion could not follow from a decision to overrule *Runyon*.

II. PETITIONER'S RACIAL DISCRIMINATION CLAIM DOES NOT CALL FOR A FUNDAMENTAL EXTENSION OF LIABILITY UNDER SECTION 1981

The Court's *per curiam* opinion stated that the decision to reconsider *Runyon* was based on "the difficulties posed by petitioner's argument for a fundamental extension of liability under 42 U.S.C. § 1981". *Patterson*, 108 S. Ct. at 1420. Respectfully, petitioner's argument does not call for a "fundamental extension" of section 1981 liability. The right to be free from racial harassment in the performance of an employment contract is an essential element of the right to make and enforce contracts free from racial discrimination.

Racial harassment has long been recognized as a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). *See, e.g., Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied sub nom. Bunta v. United States*,

434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976).[32]

Victims of racial harassment, however, derive little practical benefit under Title VII. Unlike section 1981, Title VII remedies are limited to back pay, 42 U.S.C. § 2000e-5(g); this is an illusory remedy for a plaintiff who has not been fired or denied promotion. Section 1981, in contrast, provides real relief for victims of racial harassment[33] in the form of compensatory and punitive damages.[34]

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32 Citing these cases, this Court in *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 2405 (1986), unanimously relied upon Title VII's prohibition against racial harassment in recognizing similar protections against sexual harassment.

33 *See, e.g., Young v. I.T.&T. Co.*, 438 F.2d 757, 758 (3d Cir. 1971) (recognizing section 1981 claim where plaintiff was "harassed . . . both maliciously and wantonly"); *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377, 1385 (N.D. Cal. 1987) (allowing damages under section 1981 upon a finding, *inter alia*, of a "racially discriminatory atmosphere within the company").

34 *Johnson*, 421 U.S. at 460 ("An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."). In both *Johnson*, 421 U.S. at 455, and *Goodman*, 107 S. Ct. at 2620, plaintiffs raised claims including racial harassment and discrimination in the terms and conditions of employment. In neither case did this Court suggest that such claims were beyond the scope of section 1981.

CONCLUSION

For all these reasons, the Court's decision in *Runyon* v. *McCrary* should not be overruled.

June 24, 1988

Respectfully submitted,

CONRAD K. HARPER
STUART J. LAND
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
JUDITH A. WINSTON
RICHARD T. SEYMOUR
STEPHEN L. SPITZ
LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1400 Eye Street, N.W.
(Suite 1400)
Washington, D.C. 20005
(202) 371-1212

THOMAS D. BARR
ROBERT F. MULLEN
Counsel of Record
PAUL M. O'CONNOR III
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
(212) 428-1000

ALBERT E. ARENT
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

PAUL A. BREST
Stanford University
Law School
Stanford, California 94305

THOMAS I. ATKINS
135 Eastern Parkway
Brooklyn, New York 11238

DAVID R. BRINK
2200 First Bank Place East
Minneapolis, Minnesota 55402

ST. JOHN BARRETT
1819 H Street, N.W.
Washington, D.C. 20006

WILLIAM H. BROWN, III
1600 Market Street
Philadelphia, Pennsylvania 19103

G. D'ANDELOT BELIN
53 State Street
Boston, Massachusetts 02109

GOLER TEAL BUTCHER
1608 Crittenden Street, N.W.
Washington, D.C. 20011

BROOKSLEY BORN
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

ROBERT CARSWELL
153 East 53rd Street
New York, New York 10022

WILEY A. BRANTON, SR.
1722 Eye Street, N.W.
Washington, D.C. 20006

RAMSEY CLARK
36 East 12th Street
New York, New York 10003

JEROME A. COOPER
409 North 21st Street
Birmingham, Alabama 35203

MACDONALD FLINN
1155 Avenue of the Americas
New York, New York 10036

MICHAEL A. COOPER
125 Broad Street
New York, New York 10004

LAURENCE S. FORDHAM
260 Franklin Street
Boston, Massachusetts 02110

LLOYD N. CUTLER
2445 M Street, N.W.
Washington, D.C. 20037

ALEXANDER D. FORGER
One Chase Manhattan Plaza
New York, New York 10005

JAMES T. DANAHER
2600 El Camino Real
Palo Alto, California 94306

ELEANOR M. FOX
New York University
Law School
New York, New York 10012

DREW S. DAYS III
Yale Law School
New Haven, Connecticut 06520

JOHN D. FRENCH
33 South Sixth Street
Minneapolis, Minnesota 55402

ARMAND DERFNER
145 King Street
Charleston, South Carolina 29407

LLOYD K. GARRISON
1285 Avenue of the Americas
New York, New York 10019

SARA-ANN DETERMAN
555 Thirteenth Street, N.W.
Washington, D.C. 20004

A. SPENCER GILBERT, III
Post Office Box 651
Jackson, Mississippi 39205

PAUL R. DIMOND
320 North Main
Ann Arbor, Michigan 48107

WILLIAM M. GUTTMAN
1271 Avenue of the Americas
New York, New York 10020

JOHN W. DOUGLAS
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

JOAN HALL
One IBM Plaza
Chicago, Illinois 60611

VICTOR M. EARLE, III
80 Pine Street
New York, New York 10005

HERBERT J. HANSELL
1450 G Street, N.W.
Washington, D.C. 20005

ROBERT EHRENBARD
101 Park Avenue
New York, New York 10178

HUGH R. JONES, JR.
60 State Street
Boston, Massachusetts 02109

FRED N. FISHMAN
425 Park Avenue
New York, New York 10022

JOHN B. JONES
1201 Pennsylvania Avenue, N.W.
Washington, D.C 20044

STUART L. KADISON
2049 Century Park East
Los Angeles, California 90067

ROBERT H. KAPP
555 Thirteenth Street, N.W.
Washington, D.C 20004

NICHOLAS deB. KATZENBACH
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07960

MAXIMILIAN W. KEMPNER
237 Park Avenue
New York, New York 10017

ROBERT M. LANDIS
1500 Market Street
Philadelphia, Pennsylvania 19102

JEROME B. LIBIN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

GEORGE N. LINDSAY
875 Third Avenue
New York, New York 10022

JOHN V. LINDSAY
237 Park Avenue
New York, New York 10017

HANS F. LOESER
One Post Office Square
Boston, Massachusetts 02109

HENRY L. MARSH III
509 North Third Street
Richmond, Virginia 23261

ROBERT W. MESERVE
109 Worcester Lane
Waltham, Massachusetts 02154

ROBERT B. McKAY
New York University Law School
New York, New York 10012

RONALD S. MILLER
208 South LaSalle Street
Chicago, Illinois 60604

PETER P. MULLEN
919 Third Avenue
New York, New York 10022

ROBERT A. MURPHY
30 Federal Street
Boston, Massachusetts 02110

JOHN E. NOLAN, JR.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

SHELDON OLIENSIS
425 Park Avenue
New York, New York 10022

KENNETH PENEGAR
Southern Methodist University
School of Law
Dallas, Texas 75275

JUDITH RESNICK
University of Southern
California Law Center
Los Angeles, California 90089

ALLAN H. REUBEN
Packard Building
15th & Chestnut Streets
Philadelphia, Pennsylvania 19102

CHARLES S. RHYNE
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

ELLIOT L. RICHARDSON
1825 Eye Street, N.W.
Washington, D.C. 20006

JAMES ROBERTSON
2445 M Street, N.W.
Washington, D.C. 20037

MITCHELL ROGOVIN
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036

EDWIN A. ROTHSCHILD
233 South Wacker Drive
Chicago, Illinois 60608

CHARLES RUNYON
Post Office Box 85
Ocracoke, North Carolina 27960

STEPHEN H. SACHS
2445 M Street, N.W.
Washington, D.C. 20037

BERNARD G. SEGAL
1600 Market Street
Philadelphia, Pennsylvania 19103

JEROME G. SHAPIRO
One Wall Street
New York, New York 10005

JEROME J. SHESTACK
1600 Market Street
Philadelphia, Pennsylvania 19103

NICHOLAS U. SOMMERFELD
One Federal Street
Boston, Massachusetts 02110

ASA D. SOKOLOW
575 Madison Avenue
New York, New York 10022

CHESTERFIELD SMITH
Post Office Box 015441
Miami, Florida 33101

DAVID S. TATEL
555 Thirteenth Street, N.W.
Washington, D.C. 20004

RANDOLPH W. THROWER
First National Bank Tower
Atlanta, Georgia 30303

JOHN E. TOBIN
350 Park Avenue
New York, New York 10022

MICHAEL TRAYNOR
One Maritime Plaza
San Francisco, California 94111

MARNA S. TUCKER
2001 L Street, N.W.
Washington, D.C. 20036

HAROLD R. TYLER, JR.
30 Rockefeller Center
New York, New York 10020

HERBERT M. WACHTELL
299 Park Avenue
New York, New York 10017

ROGER WILKINS
1901 Q Street, N.W.
Washington, D.C. 20009

HOWARD P. WILLENS
2445 M Street, N.W.
Washington, D.C. 20037

Attorneys for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae